Supreme Court, U.S.
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No. 00-978

In The

Supreme Court of the United States

SANFORD P. BRASS,

Petitioner,

v.

GDQ CORPORATION, an Arkansas Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Statement of Facts

Jerral W. Jones and Sanford Brass began doing business with each other in the mid 1970's. (R. 689.) Over the years, together and through various entities, they had extensive oil and gas interests. (R. 687-88.)

During the course of their business ventures, Jones and Brass borrowed substantial sums of money and executed promissory notes to Continental Illinois National Bank ("CINB"). (R. 682.) The FDIC took over those loans as part of the CINB bail-out and filed suit against Jones, Brass and another entity that they controlled for the collection of the notes. (R. 670.) Jones paid $13.7 million to settle all of the FDIC claims against himself, Brass, and the other entity and the FDIC assigned him the notes. (R. 669-70.) Brass and Jones decided to completely divest themselves from each other and settle all their differences. (R. 681.) The transaction to divide their interests in their various holdings took over one year to document and close. (R. 685-86.) The closing binder filled two bound volumes and Brass signed a series of notes to reimburse Jones for the money that was advanced on his behalf and to settle and separate their other business interests. (R. 681.)

One of the notes, Secured Promissory Note A (R. 641), was executed by Brass, delivered to Jones (R. 633), and assigned to plaintiff GDQ Corporation (R. 624), which sought to collect the remaining sums due under the Note.

Course of Proceedings and Disposition In The Court Below

Plaintiff GDQ filed this action on June 5, 1997 seeking recovery from defendant Brass of the recourse amount due on Note A. (App. 20.) The parties filed cross motions for summary judgment.

In his opposition to GDQ's motion for summary judgment, Brass contended that (a) pursuant to 28 U.S.C. § 1359, there was no federal diversity jurisdiction as the assignment was a sham and the assignor and Brass were not diverse, (b) the assignment was invalid, (c) there were genuine issues of material fact relating to various claims of fraud allegedly committed by Jones, as well as the assignment, and (d) he was entitled to various offsets. In a 34-page opinion, on November 2, 1998, the district court ruled against Brass. (App. 3.)

On November 17, 1998, Brass filed a motion for reconsideration, in which he reargued his contentions concerning jurisdiction and argued for the first time that GDQ's suit was barred by the Texas statute of limitations (having previously argued that the Oklahoma statute of limitations controlled) and the assignment was champertous. Brass did not appeal the portion of the district court's decision addressing the claims for fraud and offsets.

On December 23, 1998, the district court issued a 5-page opinion denying in pertinent part the new claims (App. 41), but vacating the summary judgment and setting the matter down for hearing upon certain limited evidentiary matters relating to the existence of diversity

jurisdiction and the applicable law governing the note assignment. (App. 44-45.)

An evidentiary hearing was conducted in the district court on August 11, 1999. On September 2, 1999, the district court issued a 33-page comprehensive memorandum and order reinstating the judgment in favor of plaintiff GDQ and against defendant Brass. (App. 47.)

In its opinion, the district court found that:

> [t]he evidence introduced at the August 1999 hearing convinces the Court that neither Jones, Chambers, GDQ, nor Bright, the only parties involved in the assignment of Note A, acted collusively or improperly to create federal jurisdiction through the assignment.

(App. 55.) This conclusion was supported by a host of specific findings of fact, including the following:

> – GDQ "has paid all legal fees incurred thus far, which total hundreds of thousands of dollars." (App. 56.)
>
> – "Jones convincingly explained at the hearing that he made the assignment to GDQ because he did not have the time or desire to personally continue efforts to collect on the note." (App. 56.)
>
> – "The note had been in default for years and prior collection attempts had failed. Jones trusted Chambers, his brother-in-law and an experienced banker, to proceed quickly with appropriate collection steps, including litigation." (App. 56-57.)
>
> – "Jones, as owner of the Dallas Cowboys, a high profile sports organization dependent on

good public relations, understandably sought to avoid adverse publicity that might arise from his personal, front-line litigation on this substantial debt." (App. 57.)

– "Jones also did not want to draw public attention to his personal business matters or be required to spend substantial time on the litigation." (App. 57.)

– "Jones, Chambers and Bright did not recognize the federal jurisdictional consequences of the assignment." (App. 57.)

– "Neither Jones nor Chambers takes any interest in the legal aspects of the collection of Note A. Neither Jones nor Chambers spoke to Rovell [lead counsel] or anyone else about the forum of any collection lawsuits." (App. 57.)

– "Bright testified convincingly and without contradiction that he has not ever represented clients in litigation, as his practice is confined to transactional work." (App. 57.)

– "The Court also credits Bright's testimony that he did not participate in (and was unaware of) any conversations discussing the possible effect of the assignment on the forum for the collection litigation on federal diversity jurisdiction until *after* the transaction was completed and Rovell recommended filing in federal court." (App. 57-58.)

– "The Court finds further that the communications between attorneys Rovell and Bright with each other and with Jones at the early stages of this litigation were to gather information and documents necessary to GDQ and its counsel to prosecute this suit." (App. 58.)

> – "The Court also finds that GDQ, through its principal, Chambers, now has, and has had since the assignment, full responsibility for collection of Note A." (App. 59.)

Following additional consideration of evidence concerning the calculation of amounts due and owing on the Note, the district court entered a Further Amended Superseding Final Judgment on November 16, 1999 in favor of plaintiff and against defendant in the amount of $5,497,062.15 with interest at the federal judgment rate from September 1, 1999. (App. 84.)

Brass filed a notice of appeal, but did not appeal the district court's rejection of his claims for fraud or offsets and did not contend there were genuine issues of material fact. (App. 1-2.) On August 11, 2000 (one day after the oral argument), the Fifth Circuit Court of Appeals issued a per curiam opinion affirming in its entirety the district court's opinion. (App. 1.) Brass's petition for rehearing and rehearing en banc was denied on September 15, 2000. (App. 86.)

Brass filed his petition for writ of certiorari solely on the issue that the district court did not have federal jurisdiction. He no longer challenges the validity of the assignment or contends that he does not owe the money, that suit was not filed within the applicable statute of limitations, or that the assignment was champertous.

REASONS FOR NOT GRANTING THE PETITION

This Court should not grant the petition for a writ of certiorari to review a non-published opinion of the federal court of appeals which (1) under Fifth Circuit Rule 47.5.4 is non-precedential; (2) follows precisely the Court's opinion in *Kramer v. Carribean Mills, Inc.*, 394 U.S. 823 (1969); (3) is dependent on a series of factual findings that are not challenged; and (4) is not in conflict with other decisions of the courts of appeals.

The District Court Had Federal Jurisdiction

28 U.S.C. § 1332(a)(1) provides that the federal court has diversity jurisdiction over cases where the matter is between citizens of different states and the amount in controversy exceeds $75,000. Brass's position boils down to the claim that diversity jurisdiction does not exist as the assignment between Jones and plaintiff GDQ must be disregarded and there is no diversity of citizenship between Jones and defendant Brass.

From the Judiciary Act of 1789 to the judicial revision of 1948, "broadly speaking," federal jurisdiction was unavailable, regardless of the citizenship of the assignee, if the assignor could not have brought suit in the federal court. *Caribbean Mills, Inc. v. Kramer*, 392 F.2d 387, 389 (5th Cir. 1968), *aff'd*, 394 U.S. 823 (1969). That changed with the 1948 revision and the adoption of 28 U.S.C. § 1359, which rejected the Code's blanket prohibition against assignees bringing suit in federal court if their assignors

could not.[1] Instead, jurisdiction now exists between an assignee and a diverse defendant *unless* the assignment was improper or collusively made to invoke federal jurisdiction. *Caribbean Mills*, 392 F.2d at 389.

Thus, in *Caribbean Mills* because the trial court found that there was nothing legally improper with the assignment and there was no collusion between the assignor/assignee and the defendant, it upheld jurisdiction, notwithstanding that the admitted purpose of the assignment was to create federal jurisdiction and the assignor retained 95% of the recovery. 392 F.2d at 388. The court of appeals, however, believed that the trial court's construction was too narrow and expanded the proscription to include assignments that were entered for the purpose of creating federal jurisdiction. 392 F.2d at 393.

It was in this context that this Court decided *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1961), where it agreed with the Fifth Circuit and noted that the " 'manufacture of Federal jurisdiction' was the very thing which Congress intended to prevent when it enacted § 1359 and its predecessors." 394 U.S. 823, 829 (1969). The Court had previously held in other cases that "where the transfer of a claim is absolute, with the transferor retaining no interest in the subject matter, then the transfer is not 'improperly or collusively made,' regardless of the transferor's motive." *See Kramer*, 394 U.S. at 828, n.9. Where, however,

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[1] 28 U.S.C. § 1359 provides the following:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

a partial assignment has been made, thereby creating diverse parties, the Court held in *Kramer* that federal jurisdiction exists unless the parties acted with a motive to create federal jurisdiction. 394 U.S. at 827-28 and n.9.

As set forth in *Kramer*, then, the Court has held that where a complete assignment of an interest has been made, then it is conclusively presumed that it is not improper or collusive. Where, however, as here and in *Kramer*, a partial assignment has been made, the Court has mandated that jurisdiction exists unless the assignment was motivated by a desire to create federal jurisdiction. The parties' motive in making the assignment must therefore be determined in cases such as this involving partial assignments.[2]

Notwithstanding the Court's holding that motive must be determined in cases of partial assignments, Brass argues that any partial assignment that permits federal jurisdiction, even if the purpose of such assignment was not to manufacture federal jurisdiction, must be automatically prohibited. (Petition at 17.) Brass, however, cites no

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[2] Brass suggests that "the motivation of Kramer was an *additional* (not the controlling) reason why § 1359 had been violated" and that the Court had actually relied on various objective factors such as the assignor's retention of a substantial interest and the assignment being a collection contract in determining that the assignment did not create diversity jurisdiction. (Petition at 9.) These factors, however, were not paramount to motive, but rather evidence of it. Indeed, the Court expressly stated that "a motive to create diversity jurisdiction" was the test for assignments, but it was not deciding whether it was the test for administrators. 394 U.S. at 828, n.9.

law for this remarkable proposition, which requires the overruling of *Kramer*. Indeed, a keycite of *Kramer* indicates that this decision has been cited and followed in approximately 130 cases and, as noted by the Fifth Circuit in *Bianca v. Parke-Davis Pharmaceutical Div. of Warner-Lambert Co.*, 723 F.2d 392, 395 (5th Cir. 1984), "[b]uoyed by the *Kramer* decision the 'motive/function' rule of McSparran was quickly adopted in many other circuits."[3]

Brass's argument that the 1948 amendment *limits* federal jurisdiction (see Petition at 13) is mystifying given that pre-1948 federal jurisdiction could not be obtained by an assignment and after 1948 *only* improper or collusive assignments deprived the court of federal jurisdiction. Brass's argument necessarily requires not only the overruling of *Kramer*, but the reenactment of the assignee clause in the Judiciary Act of 1789 that contained the blanket prohibition against assignees bringing suit in federal court if their assignors could not. Only in the world of Alice in Wonderland, where a word can mean whatever he wants it to mean, could Brass argue that the 1948 amendment limited federal jurisdiction.

Nor can Brass claim that an unpublished opinion here, which by rule has no precedential value, can create

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[3] Brass argues that *Bianca* is no longer good law because it involved the creation of diversity by the appointment of guardians or administrators and the subsequent addition of 28 U.S.C. § 1332(c)(2) "eliminated the need to ever examine the 'motive/function' of such appointments." (Petition at 11-12.) Because, however, *Bianca* was decided under § 1359, the section that controls here, the subsequent enactment of another section (not relevant here) does not vitiate its holdings relative to § 1359.

a conflict with the circuits. (See Petition at 7.) Moreover, the alleged conflict with *Attorney's Trust v. Videotape Computer Prods., Inc.*, 93 F.3d 593 (9th Cir. 1996), is no conflict at all. At most, Brass cites *Attorney's Trust* for language that "there is no reason to give motive controlling weight." (Petition at 8.) Not only is that statement dicta, but Judge Atlas here noted that "despite the court's disavowal of any consideration of intent or motive, [the Ninth Circuit in *Attorney's Trust*] did in fact consider those matters" and found that the assignment "was part of a transaction that was obviously a sham for the purpose of creating federal jurisdiction." (App. at 54, n.6.)

CONCLUSION

For the reasons set forth above, respondent GDQ Corporation requests that this Court deny the petition for writ of certiorari of Sanford Brass.

Respectfully submitted,

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